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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, Governor of the State of Arizona, et al.,
Defendant Appellants,
and
ARIZONA FARM BUREAU FEDERATION, an Arizona corporation, et al.,
Intervenor Appellants,
v.
UNITED FARM WORKERS NATIONAL UNION on behalf of itself and its members, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF AMICUS CURIAE, AGRICULTURAL LABOR RELATIONS BOARD

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This brief is filed with the written consent of all parties pursuant to Rule 42 of this Court.

INTEREST OF THE AMICUS CURIAE

The Agricultural Labor Relations Board (hereinafter, "ALRB" or "Board") is a California administrative

agency established in 1975 to enforce the California Agricultural Labor Relations Act (hereinafter "ALRA"). During the course of the instant litigation in the district court, the parties and the court frequently compared the challenged Arizona Agricultural Employment Relations Act (hereinafter "AERA") to the California ALRA.

An amicus curiae brief urging reversal of the district court decision has been filed by the Agricultural Producers Labor Committee and the South Central Farmers Committee, two trade associations representing California agricultural employers. Their brief (hereinafter, "California employers' brief") contends that affirmance of the district court opinion would threaten the constitutionality of many of the ALRA's provisions. Their claims are based on an out-of-context reading of the district court opinion, coupled with a distorted view of the ALRA.

The ALRB believes that the California act conforms to the constitutional guidelines enunciated by the district court and that affirmance of the decision would not affect the ALRA's constitutionality. The Board further believes that there must be a response to the erroneous claims of the California employers so that, in considering the important questions raised by this case, the Court will not be distracted by false issues. As the agency administering the California act, the ALRB is in the best position to make that response.

ARGUMENT

Introduction

A brief explanation of the functioning of the ALRA is necessary to understand the differences between the California and Arizona statutes and the reasons why affirmance of the district court decision would not affect the ALRA.

The California act grants employees organizational and bargaining rights (Cal. Lab. Code § 1152); provides for secret ballot elections to select a collective bargaining representative or no union (Cal. Lab. Code §§ 1156–9); and characterizes a variety of acts by employers and labor organizations as unfair labor practices. (Cal. Lab. Code §§ 1153–1155.7.) While modeled in some respects on the National Labor Relations Act, the ALRA's election provisions are significantly different from those under the NLRA, reflecting the exigencies of a seasonal industry with a mobile workforce.

The ALRA election process is triggered by the filing of a petition accompanied by authorization cards signed by a majority of the currently employed employees in the bargaining unit. (Cal. Lab. Code § 1156.3(a).) The bargaining unit generally includes all agricultural employees of an employer; however, where the employees work in two or more noncontiguous geographical areas, the Board is given discretion to determine the appropriate unit. (Cal. Lab. Code § 1156.2.) A representation petition is timely only when the employer's payroll reflects at least 50 percent of

peak agricultural employment for the current calendar year. (Cal. Lab. Code §§ 1156.3(a)(1); 1156.4.) If the Board, after investigation, concludes that a question of representation exists, it must direct a secret ballot election within seven days of the filing of the petition. (Cal. Lab. Code § 1156.3(a).) All agricultural employees who worked during the payroll period preceding the filing of the petition are eligible to vote. (Cal. Lab. Code § 1157.) An agricultural employee is defined as any employee engaged in agriculture. (Cal. Lab. Code § 1140.4(b).)

Within five days after an election, any person may file a petition asserting that allegations made in the representation petition were incorrect, that the Board improperly determined the geographical scope of the bargaining unit, or that conduct occurred which affected the results of the election. These objections are considered at a hearing. (Cal. Lab. Code § 1156.3(c).) Unless the Board finds that there are sufficient grounds to refuse to do so, it must certify the election. (*Id.*) The Board may not direct an election in any bargaining unit where a valid election has been held in the past twelve months. (Cal. Lab. Code § 1156.5.)

The California act contains no express provision concerning access. However, the Board has promulgated a regulation permitting non-employee organizers a limited right of access to an employer's property at the worksite for organizing purposes. (8 Cal. Admin. Code § 20900.) This rule is based on the Board's interpretation of the statement of employee rights in

California Labor Code section 1152, in light of the ALRB's findings concerning the general absence of alternative means to communicate with farmworkers. (*NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).) The Board has also interpreted section 1152 as authorizing visits by non-employee organizers to employees living in privately-owned camps. (See, e.g., *Vista Verde Farms,* 3 ALRB No. 91 (1977); *Anderson Farms Company,* 3 ALRB No. 67 (1977).)

I. The California Act Maximizes Employee Participation in the Voting Process

A. The ALRA's Peak Requirement Ensures That Elections Are Held When Most Employees Are Present

The district court held that the representation provisions of the Arizona statute were unconstitutional because they failed to ensure that elections could be petitioned for and conducted during peak employment when most employees would be present to vote. The court found that the AERA's pre-election procedures were so protracted that they could not be completed during the brief periods of peak employment, virtually guaranteeing that the majority of employees would have finished work and left their places of employment before an election could be held. In the words of the district court, the AERA's procedures, applied in the context of agricultural labor, "make it impossible for the Agricultural Employment Relations Board to conduct a timely election to effect the purpose of the Act."

(A-25-26.)

By contrast, the ALRA is carefully structured to ensure that elections will be conducted when the workers are present. An election petition under the California act may be filed only when the employer's payroll reflects at least 50 percent of the peak agricultural employment for the current calendar year. (Cal. Lab. Code §§ 1156.4, 1156.3(a)(1).) An election must be held within a maximum of seven days. (Cal. Lab. Code § 1156.3(a).) All challenges to the election are reserved for a post-election hearing. (Cal. Lab. Code § 1156.3(c).) The ALRA emphasizes speedy election proceedings, held at peak, because the California Legislature "recogniz[ed] that agriculture is a seasonal occupation for a majority of agricultural employees, and wish[ed] to provide the fullest scope of employees' enjoyment of the rights in this part." (Cal. Lab. Code § 1156.4.)

Nonetheless, the California employers claim that the ALRA fails to meet the criteria of the district court simply because the California act does not expressly require elections to be held at peak. This highly technical argument ignores the actual functioning of the California act. As a practical matter, the statutory requirements that the petition be filed at peak and that the election be held within seven days make it unlikely that peak will have passed by the time of the election. The Board has held 866 elections since the ALRA became effective in August 1975. In only a few elections has a party contended that the turnout was low because

the election was held after the end of peak. Most such objections have arisen in cases where, because of the flood of petitions during the ALRB's first months, elections were occasionally held beyond the statutory seven-day period. In such cases, where it is shown that low voter turnout resulted from the end of peak, the Board has set aside the election. (See, e.g., *Mapes Produce Co.*, 2 ALRB No. 54 (1976).)

Affirmance of the district court decision might, at most, require the ALRB to invalidate a few additional elections which were not held at peak. It would hardly render unconstitutional a statute designed to concentrate representation procedures during peak employment and which actually holds 98 percent of the elections at peak.

B. The California Act Enhances Voter Eligibility

The district court held that the Arizona statute precluded a "significant and substantial" number of employees from voting because it required an employee to work for the same employer in two successive calendar years in order to be eligible to vote. (A-28.) Additionally, an employee who satisfied the two-year eligibility requirement might still be denied the right to vote if not employed at the time of the election. (A-27-28.) Because, as the court found, many farmworkers work only briefly for a particular employer and do not return to the same employer in successive years (A-16, 28), the AERA's eligibility criteria withheld

voting rights from many agricultural employees.

The ALRA's eligibility provision is entirely different. It establishes no prior-employment requirement, but provides simply that all employees who worked during the payroll period immediately preceding the filing of the representation petition may vote. (Cal. Lab. Code § 1157.) By Board decision, employees who were on vacation or sick leave during the designated payroll are also eligible. (*Rod McLellan Co.*, 4 ALRB No. 22 (1978); *Rod McLellan Co.*, 3 ALRB No. 6 (1977); *Yoder Bros. Inc.*, 2 ALRB No. 4 (1976).) Thus, eligibility under the ALRA is based on present employment directly preceding an election, rather than on employment in previous years. In view of the district court's findings concerning the "migratory and transitory nature of agricultural employment" (A-28), the ALRA's approach maximizes voter eligibility.

Nor is the ALRA vulnerable to constitutional challenge, as the California employers contend, because it precludes employees of long duration from voting if not employed during the pre-election eligibility period. The district court's criticism of the AERA in this respect came in an entirely different context. The Arizona statute imposed a present employment requirement *on top of* a requirement that an employee have worked in the prior calendar year. It was this combination of eligibility barriers, as applied to migrant farmworkers, that the district court held unconstitutional.

Since the California act establishes only a single eligibility criterion, which maximizes eligibility, it

conforms to the district court's constitutional requirements.

C. The California Act's Election Bar Is Valid

The district court found the Arizona law's election bar suspect because it permitted an election held among a small number of permanent employees to bar another election for twelve months even if the employer hired hundreds of seasonal employees later in the same year. This result was possible because the AERA permitted bargaining units to include both permanent and seasonal employees, restricted voter eligibility, and failed to provide for peak season elections. (A-28-29.)

Contrary to the claim of the California employers, the ALRA's election bar (Cal. Lab. Code § 1156.5) could not produce this result. Because of the seasonality and turnover in agriculture, any election bar will prevent some employees from voting who were not working when the election was held. These employees will necessarily be bound by the choice of other workers employed at a different time of year. However, this result is unjust only if—as the district court found likely under the Arizona act—the number of employees voting is unrepresentative.

The ALRA's peak requirement, coupled with its broad definition of voter eligibility, ensures that the single election within a twelve-month period will be held at a time when a high complement of workers is present and eligible to vote. Thus, election results will

reflect the choice of a representative group of employees. Imposition of an election bar in these circumstances is proper, and serves the same salutory purposes as the NLRA's election bar—providing stability in labor relations. (29 U.S.C. § 159(c)(3); see *Brooks* v. *NLRB,* 348 U.S. 96, 100 n. 8 (1954).)

It is possible, as the California employers note, that in crops with particularly high turnover, the number of employees working during the peak payroll period may be less than 50 percent of the total number of workers employed throughout the rest of the year. Thus, if a California grower employs 500 workers in September and 100 different employees in each of the other 11 months of the year, an election conducted in September among the 500 employees will bind the other 1100 employees employed at some point during the year. This is a proper result since the September election, held at peak, is as representative as possible. By contrast, the election bar under the Arizona statute permitted an election among 100 workers in June to bind the 1500 other employees who worked during the rest of the year. It was the likelihood of such grossly unrepresentative elections which rendered the Arizona election bar invalid.

II. The Absence of Explicit Authority for a Bargaining Order Does Not Render the ALRA Unconstitutional

The district court ruled that the Arizona statute was defective because it prohibited the Arizona labor board

from issuing bargaining orders in cases of egregious employer misconduct. (A-19, 29–30.) The court did not hold that bargaining orders are constitutionally mandated in all labor relations statutes, but simply that the AERA's prohibition on such orders was part and parcel of its overall failure to protect First Amendment associational rights.

The California employers contend that affirmance of the decision would straitjacket the ALRB and the California courts into requiring bargaining orders under the ALRA, a result which, they suggest, would not occur without the constitutional compulsion of the instant case.

Although the ALRB has not yet ruled on whether bargaining orders may issue under the California act, on December 21, 1978 an ALRB Administrative Law Officer (the equivalent of an NLRB Administrative Law Judge) held that the ALRA permits such a remedy under appropriate circumstances. Interpreting section 1148 of the California Labor Code, which requires the ALRB to follow applicable NLRA precedents, the Administrative Law Officer held that the NLRB remedy of a bargaining order (see *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969)) was applicable to the ALRA because the employer had committed such extensive unfair labor practices that the holding of a fair election was impossible. Since California Labor Code section 1153(f) prohibits an employer from recognizing or bargaining with an uncertified union, the Administrative Law Officer recommended that the Board certify the union

whose majority status had been destroyed by the employer's unlawful conduct. (*Harry Carian,* 77-RC-15-C, 77-CE-92-C (1978).)

While the ALRB must finally resolve this issue, this very recent decision simply underscores the prematurity of the California employers' claim that a bargaining order could never issue under the ALRA. The California employers further ignore the fact that the district court's discussion of bargaining orders came in the context of the court's conclusion that the Arizona representation procedures were defective in their entirety. How and in what circumstances the district court's reasoning would apply to the ALRA, a vastly different act, is not before this Court and is purely speculative.

III. Affirmance of the District Court Decision Would Not Affect Access Rights Under the ALRA

The district court held that the access provision of the Arizona statute was unconstitutional because it gave an agricultural employer an absolute right to exclude organizers from his property, including a labor camp which was the functional equivalent of a company town, even where there were no alternative means to communicate with his employees. (A-18, 36-40.) In short, the AERA provision precluded the Arizona labor board from ordering access even where it might prove to be constitutionally required. (*Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Peterson* v. *Talisman Sugar Co.,* 478 F.2d 73 (5th Cir. 1973).)

Contrary to the California employers' claim, the district court did not rule that the Arizona labor board had an obligation to enforce the constitution. Rather, the court held that the State of Arizona could not enact a total prohibition against entry to private property where such an absolute ban cut off all communication with persons living in the agricultural equivalent of a company town.

Unlike the Arizona act, the California ALRA does not purport to prohibit access. Consequently, the district court's reasoning in invalidating the no-access provision of the Arizona statute is inapplicable. The district court decision is irrelevant to access under the California act for other reasons, as well. First, because the decision dealt only with labor camp access and was based on the company town model of *Marsh* v. *Alabama, supra,* it would have no impact on access rights at the worksite which the ALRB enforces by regulation. (8 Cal. Admin. Code § 20900, upheld as constitutional in *ALRB* v. *Superior Court,* 16 Cal.3d 392, app. dism. *sub nom. Kubo* v. *ALRB,* 429 U.S. 802 (1976).)

Second, the labor camp access available in California is grounded in Labor Code section 1152 (*Merzoian Brothers Farm Management Co.,* 3 ALRB No. 62 (1977)) and in the California Constitution. (*United Farm Workers of America* v. *Superior Court,* 14 Cal.3d 902 (1975).) That right is not without restriction but, as the California employers concede, it is functionally as broad as under the First Amendment. Consequently, affirmance of the district court decision would not

broaden the right of labor camp access presently available in California.

IV. Affirmance of the District Court Decision Would Not Affect the ALRA's Prohibitions on Voluntary Recognition

The ALRA makes it an unfair labor practice for an employer to recognize or bargain with a labor organization which has not been certified under the act. (Cal. Lab. Code § 1153(f).) It also forbids a labor organization from picketing an employer for recognition or bargaining unless the union has been certified. (Cal. Lab. Code §§ 1154(g), (h).) These sections would not be affected by affirmance of the district court decision. Although the Arizona AERA contained some provisions which arguably resemble these sections of the California act, they were never discussed by the district court, which made no judgment on their constitutionality. Consequently, affirmance of the district court decision would not threaten the validity of these provisions of the California statute.

CONCLUSION

The ALRB takes no position with respect to the constitutionality of the Arizona farm labor statute. But to argue, as the California employers have done, that the two statutes have merely adopted different approaches to the problems of agricultural labor law and that they survive or fall together, ignores the vast differences between the two acts.

Unlike the Arizona statute, the Agricultural Labor Relations Act was carefully designed to accommodate the migrancy and seasonality of agricultural labor and to insure representative elections. The act's success in this regard is attested by the fact that the ALRB has held over 800 elections, in which nearly 70,000 farmworkers have voted. Affirmance of the district court decision would neither restrict the California Board and courts in interpreting the ALRA, nor threaten the constitutionality of the statute.

Date: December 22, 1978

Respectfully submitted,

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